United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

DOCKET NO. 77-1022

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P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

BERNARD WOODMANSEE, SR.,
JACKY E. DUBRAY and
ROY M. HAMLIN,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF VERMONT

BRIEF FOR APPELLANT ROY M. HAMLIN

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STATEMENT OF THE CASE

This is an appeal by the defendant, Roy M. Hamlin, from a judgment of conviction in the United States District Court for the District of Vermont, following a trial by jury before the Hon. Albert W. Coffrin, District Judge, for violation of sections 2314, 2315 and 371 of Title 18, United States Code. Judgment was entered on December 13, 1976. Notice of Appeal was filed the same day. On December 13, 1976, Roy Hamlin was sentenced to concurrent terms of eight years, eight years, and four years respectively, for the three counts.

On November 29, 1976, bail was revoked upon motion of the United States Attorney. On December 13, 1976, defendant's motion to re-instate bail was denied, and on February 8, 1977 this Court denied defendant Hamlin's motion for release pending appeal.

Roy Hamlin was arrested by federal officers on May 23, 1976 along with co-defendants Woodmansee and DuBray. These three individuals and co-defendant Virginia Reynolds were indicted by the Grand Jury on May 26, 1976 for violations of sections 2314, 2315 and 371 of Title 18, U.S.C. The three-count indictment charged, in substance: (I) that Hamlin and his three co-defendants unlawfully transported more than $5,000.00 worth of travelers checks from the State of New York to the State of Vermont (in violation of 18 U.S.C. §§2314 and 2); (II) that they unlawfully did receive, conceal, store, barter or dispose of the same within the State of Vermont, while they were moving as, or were a part of interstate

commerce (in violation of 18 U.S.C. §§ 2315 and 2); and (III) that they conspired to commit the above-described offenses (in violation of 18 U.S.C. §371).

The Government's first witness was Michael Churchill, an informant, whose record included four felony convictions. The Court refused to permit counsel to cross-examine Churchill regarding a misdemeanor conviction which occurred during the period of Churchill's active cooperation with federal and state law enforcement officials. (A-165-169) (As used herein, "A" refers to appendix, "T" to transcript and "R" to record.)

After the Government rested, the defendant made a motion for a judgment of acquittal. (T-1034) Said motion was denied.

The defendant Hamlin did not take the stand in his own behalf, nor did he present any witnesses on his behalf.

Written requests to charge were submitted to the Court by all parties. Among others, defendant Hamlin requested the Court to instruct the jury that mere presence in the vicinity of stolen property is insufficient of itself to establish possession of the property. The Court failed to instruct the jury as requested, and refused to do so upon objection after completion of the charge. (A-236)

The Court also failed to instruct the jury that it could consider as substantive evidence any prior statement given by a witness before the grand jury. Objection was duly made by Duncan Kilmartin, attorney for defendant Woodmansee, but the Court failed to give an additional instruction. (A-234-235)

A guilty verdict as to all three counts was returned by the jury on November 6, 1976. On November 15, defendant Hamlin filed a motion pursuant to Rules 29(c) and 33 of the Federal Rules of Criminal Procedure for a judgment of acquittal, or, in the alternative, for a new trial. The motion was based in part on the grounds that the Government had failed to prove Hamlin's participation in the conspiracy by a fair preponderance of the non-hearsay evidence and that the Government had failed to prove Hamlin's guilt beyond a reasonable doubt. (R. Document #138) The Court denied the motion. On December 13, 1976 defendant Hamlin was sentenced as aforesaid.

STATEMENT OF FACTS

In late April, 1976, one Michael Churchill, an informant cooperating with the federal Drug Enforcement Agency and the Drug Enforcement Unit of the Vermont State Police, was requested by state trooper Ruggerio to contact Roy Hamlin's co-defendant, Bernard Woodmansee, Sr., with instructions to see if he was violating the law in any way. (A-155)

Churchill's cooperation with federal and state law enforcement officers had been elicited in early March, 1976 on the occasion of his own arrest by federal drug enforcement officers for the three sales of methamphetamine. (T-95) Churchill, nineteen years old at the time of his arrest, had already accumulated a record of three felony convictions. Upon this arrest, he had suddenly "seen a light" (A-153) and had decided to cooperate with the police. The only promise made to Churchill by law enforcement officers was that his cooperation would be made known to the U.S. Attorney and to the Court. However, he clearly had in mind to stay out of jail at all costs. (A-163-164)

In the early part of May, 1976, Churchill contacted Woodmansee on a number of occasions and attempted to gain participation in Woodmansee's criminal activities. On May 15, 1976, Churchill again contacted Woodmansee and arranged to meet him at Howard Johnson's parking lot in South Burlington, Vermont. At the meeting Woodmansee asked Churchill if he could "move" travelers checks. Churchill said he could pass $20,000.00 worth. (A-104) The two men proceeded to a house

owned by Shirley Bushey at 63 Susie Wilson Road (hereinafter referred to as the Bushey residence). Woodmansee told co-defendant Virginia Reynolds (Shirley Bushey's daughter who resided there) to "call Roy." (A-105)

Churchill admitted on cross-examination that he had believed at the time that Reynolds had dialed only seven digits (the number required for a local call), instead of eleven digits, (the number for an out-of-state call). He also admitted that he had told the Grand Jury that only seven digits had been dialed. (A-143-144) Additionally, he contradicted himself as to the time of the call (compare A-106 with A-125). However, telephone company records do show a telephone call made on May 15, 1976 at 1707 hours (5:07 p.m.) from the Bushey residence to Hamlin's residence. (Gov't ex. #49)

Churchill had no personal knowledge of the party on the other end of Woodmansee's telephone conversation (A-145) but did hear Woodmansee order "twenty tickets". (A-105)

On May 21, Churchill again called Woodmansee as he had been instructed. (T-50;62) Churchill drove to the Burlington area and again called Woodmansee. (T-65) Woodmansee told Churchill that he should meet him at the Bushey residence. (Gov't ex. #2) After Churchill arrived at the Bushey residence, Woodmansee placed a telephone call to "Roy" and determined that "Roy" would be arriving in "a couple of hours." (T-68) He invited Churchill to go out for a few drinks and Churchill accepted. Arriving back at the Bushey residence between five and six p.m., Woodmansee received a telephone call, and sub-

sequently informed Churchill that "They're on their way." (A-110)

Roy Hamlin was spotted driving Jackie DuBray's yellow 1969 Chrysler heading north on U.S. Route 7 in South Burlington at approximately 7:00 p.m. on May 21, 1976, by Sgt. Wesley Newman of the Vermont State Police. (T-592-595) Jackie DuBray was a passenger in the car. The progress of the car and its occupants was followed as it proceeded toward the Bushey residence. When it arrived at the residence, the two men got out of the car and entered the house. (T-602-603)

According to Churchill, once inside, DuBray handed a brown paper bag to Woodmansee (A-110, 112-113) who went immediately to another part of the house. (A-113) Hamlin said nothing but "hi" to anyone except Shirley Bushey with whom he began a lengthier conversation. (A-147-148) According to Shirley Bushey, there was no brown paper bag; (T-1107) Jackie DuBray said little or nothing once inside, and Hamlin and Woodmansee began a conversation about their days together in prison. (T-1133-1134)

A few minutes after Woodmansee departed, Reynolds told Churchill that Woodmansee wanted to see him in the bedroom. Upon entering the bedroom, Churchill saw Woodmansee sitting on the bed with a brown bag similar to the one he had seen DuBray carry in, and a large quantity of travelers checks. (A-113-114) Woodmansee instructed Churchill how and where to cash the travelers checks (A-114-115) and further instructed him to call him on the telephone to report his progress. (A-117)

On May 23, 1976, at 10:15 a.m., Churchill called Woodmansee at the Bushey residence, and arranged to meet him at the Stockyard Inn Restaurant in Montpelier, Vermont at 12:30 p.m. (Gov't ex. #3) Churchill arrived at the restaurant at approximately 12:15 p.m. He had been given $3,900.00 in cash by Agent Curran of the F.B.I. He waited in the parking lot outside the restaurant for one and one-half hours before being informed by an F.B.I. agent that Woodmansee and the others were already inside. (A-120-121)

Churchill testified that as he approached the restaurant he saw both Woodmansee and Hamlin peering out a window, presumably looking for him. (A-121) The allegation that Hamlin as well as Woodmansee were waiting was flatly contradicted by three other witnesses, to wit: Kay Raney (A-195), Ronald Ceppetelli (A-198-199) and F.B.I. Agent Hess (A-200-201).

After entering the restaurant, it was necessary for Churchill to return to his car to retrieve the money given him by Agent Curran. Upon re-entering, he and Woodmansee retreated to a back room (A-122), although there was no-one in the part of the restaurant where Woodmansee, Hamlin and DuBray had been sitting prior to Churchill's arrival. Once apart from DuBray and Hamlin, Churchill gave Woodmansee a bag containing the $3,900.00 and Woodmansee gave Churchill an envelope containing an additional $6,000.00 in travelers checks. (A-122)

After the exchange, Woodmansee and Churchill returned to where DuBray and Hamlin were sitting. Woodmansee gave the bag containing the money to DuBray. Churchill testified that he

and Hamlin engaged in a brief conversation in which Hamlin allegedly said that "after the twenty thousand was gone that he could have fifty thousand more and that we could go to Albany, New York, me and my boys, and work down there." (A-123) However, Churchill omitted this very crucial conversation in his testimony before the Grand Jury when he stated that he left immediately after the exchange. (A-151)

In either event, Churchill left shortly after the exchange. Woodmansee, Hamlin and DuBray departed shortly after Churchill. Woodmansee and Hamlin walked out together leaving DuBray to pay the bar bill which he did - at least in part - from the contents of the brown bag. (T-790-791; 839)

The F.B.I. and State Police arrested Woodmansee, DuBray and Hamlin as they were backing their car out of its parking space. The bag of money given by Churchill to Woodmansee was found in the car. (T-848)

Later that afternoon, a search warrant was issued by the Hon. Edward J. Costello, Chief Judge of the Vermont District Court. The warrant was issued upon the application of Chittenden County State's Attorney Francis X. Murray and the testimony of State Trooper John Moriarty. Pursuant to the warrant, state troopers, assisted by the F.B.I., searched the Bushey residence at 63 Susie Wilson Road. In the bedroom where Woodmansee had given Churchill the initial $4,000.00 in travelers checks, the searching officers recovered an additional $10,000.00 in travelers checks. (T-985-986)

POINT I

THERE WAS INSUFFICIENT EVIDENCE TO PROVE HAMLIN'S PARTICIPATION IN A CONSPIRACY BY A FAIR PREPONDERANCE OF THE INDEPENDENT NON-HEARSAY EVIDENCE OR TO PROVE HIS GUILT OF ANY OF THE ALLEGED OFFENSES BEYOND A REASONABLE DOUBT.

A. AT THE TIME OF THE COURT'S DETERMINATION, THE GOVERNMENT HAD NOT PROVED HAMLIN'S PARTICIPATION BY A FAIR PREPONDERANCE OF THE INDEPENDENT, NON-HEARSAY EVIDENCE.

This Court has ruled on several occasions in the recent past that before hearsay declarations of the co-conspirators can be admitted against a particular defendant, the trial court must determine that the Government has proved by a fair preponderance of the independent, non-hearsay evidence that the defendant in fact participated in the conspiracy. United States v. Geaney, 417 F2d 1116 (CA2, 1969), cert. den. 397 US 1028 (1970), United States v. Santana, 503 F2d 710, (CA2, 1974), cert. den. 419 US 1053 (1974), United States v. Wiley, 519 F2d 1348 (CA2, 1975).

This is a difficult task, even for an experienced trial judge. United States v. Santana, 503 F2d at 713. The consequences, however, are enormous. The normal rule of evidence is circumvented and a veritable wall of otherwise inadmissible material comes passing through the floodgates. Hearsay declarations of co-conspirators, which would normally be excluded upon objection, are admitted into evidence against all defendants upon the theory that the declarant, as an agent for each defendant, made the admission on behalf of each defendant. Of course these declarations are not normally subject to the

scrutiny of cross-examination. Therefore, the decision to admit these declarations ought to be undertaken with caution and examined carefully by the reviewing court.

In the case at hand, the trial court made its determination early in the proceedings. (A-191) At the time, only two witnesses had testified and only one, the informant, Michael Churchill, had testified to any facts from which a conspiracy could be inferred. (The other witness, Mary Foster, was an employee of General Electric, who testified to the unexplained disappearance of travelers checks from her office.)

Upon the state of the non-hearsay evidence at the time of the Court's determination, there was insufficient evidence to prove Hamlin's participation in a conspiracy by a fair preponderance. The substance of the independent, non-hearsay evidence, insofar as it relates even remotely to Hamlin, was as follows:

(1) On May 21, 1976, Hamlin arrived at the Bushey residence at approximately 7:00 p.m. along with DuBray. DuBray handed Woodmansee a full, brown paper bag. A few moments later, Churchill saw Woodmansee in another room with a similar looking brown bag full of travelers checks.

(2) Hamlin was present at the Stockyard Inn when Churchill arrived to exchange cash for additional travelers checks. The exchange took place without the presence of Hamlin as well as DuBray.

(a) Churchill testified that Woodmansee and Hamlin were waiting at a window at the time of his arrival.

(b) Churchill testified that after the exchange, Woodmansee gave the bag of money to DuBray. Churchill testified that he and Hamlin had a conversation in which Hamlin said in substance that after the original twenty thousand in travelers checks was gone Churchill "could have fifty thousand more, and that [he] could go to Albany, New York . . . and work there." (A-123) However, on cross-examination, Churchill reluctantly admitted that he had not testified about this conversation before the Grand Jury, although he had had the opportunity to do so.

Apart from these last two items, there is no non-hearsay evidence that Hamlin participated in any conspiracy or other crime. True, he was present at two unfortunately critical times. But mere presence does not connote participation. United States v. Johnson 513 F2d 819 (CA2, 1975). There is no evidence that he knew a crime was being committed, much less that he participated in it.

Upon arrival at the Bushey residence, DuBray carried in a paper bag. There is no indication that Hamlin was aware of any criminal conduct. He did not engage in any significant conversation. There is no evidence to indicate that he was aware that a transaction of any importance was taking place.

Again, at the Stockyard Inn, with the exception of the alleged conversation, there is no evidence to indicate knowledge of, much less participation in, a conspiracy. That Hamlin may have been at a window at the time of Churchill's arrival is trivial. That Woodmansee considered it necessary

to retreat to a private room to exchange an envelope for a paper bag in an otherwise vacant restaurant tends to prove that he was attempting to conceal the transaction from either Hamlin or DuBray. Since he immediately gave the bag to DuBray, the reasonable inference is that he sought to exclude Hamlin's perusal.

The only piece of evidence that tended to prove Hamlin's participation in a conspiracy were the remarks attributed to him by Churchill after the exchange with Woodmansee took place. Even if this conversation took place, it is ambiguous in nature and does not directly prove Hamlin's participation in a crime. More importantly, Churchill admitted on cross-examination that he had not testified about the alleged conversation before the Grand Jury. While the Government attempted to demonstrate on re-direct that he had not so testified because he wasn't specifically asked (A-157-158), the fact remains that an open-ended question was asked to which Churchill could readily have responded with testimony about the purported conversation. (A-172-173) An omission is evidence of the non-existence of the fact. 3A Wigmore, Evidence §1042 (Chadbourn Rev. 1970).

At the very least, Churchill's inconsistant Grand Jury testimony impeaches his credibility as to the occurence of the conversation. As will be more fully explored below, * the

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* See Point III, page 28

substance of his Grand Jury testimony should be considered as substantive evidence of the declarations made. In either event, in the light of the contradiction, it cannot be seriously maintained that Churchill's testimony was sufficient to demonstrate by a fair preponderance of the evidence that Roy Hamlin was a conspirator.

It may be inferred from the failure of the Court to instruct the jury that Churchill's prior inconsistant statement could be considered by them as substantive evidence that the Court, himself, did not properly consider the evidence in determining the existence of the conspiracy.

If Hamlin's participation in the conspiracy was incorrectly determined, then it was error to admit Woodmansee's declarations against him. The judgment of conviction must be reversed and the cause remanded for a judgment of acquittal.

B. UPON THE INDEPENDENT, NON-HEARSAY EVIDENCE AS A WHOLE, THE GOVERNMENT FAILED TO DEMONSTRATE BY A FAIR PREPONDERANCE THAT HAMLIN PARTICIPATED IN THE ALLEGED CONSPIRACY.

Even had the Court not made its determination of the existence of the conspiracy based upon non-hearsay evidence as early in the proceedings as he did, the Government failed to prove by a fair preponderance of the evidence that Hamlin participated in any conspiracy. In addition to the evidence summarized above, the remainder of the non-hearsay evidence may be recapitulated as follows:

1. On May 15, 1976 a telephone call was made from the Bushey residence to a telephone in the residence occupied by Roy Hamlin in Glens Falls, New York at 1707 hours. (Gov't ex. #49) *

2. On May 21, 1976, a telephone call was made from the Bushey residence to the Glens Falls residence at 1601 hours. (Gov't ex. #49)

3. On May 21, 1976 at approximately 7:00 p.m. Roy Hamlin was seen driving Jackie DuBray's yellow Chrysler automobile northward on U.S. route 7 in South Burlington. The progress of the car was tracked to the Bushey residence in Essex Junction.

4. On May 23, 1976 at approximately 11:30 a.m., Hamlin accompanied DuBray and Woodmansee from the Bushey residence to the Stockyard Inn in Montpelier.

5. According to witnesses Kay Raney, Ronald Ceppetelli and F.B.I. Agent Hess, Hamlin did not await Churchill's arrival along with Woodmansee at a window.

6. After an exchange of money and travelers checks between Woodmansee and Churchill, Hamlin accompanied Woodmansee on the way out of the restaurant. DuBray remained behind and paid the bar bill from money in the brown paper bag, which he carried.

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* Churchill contradicted himself on the times of the alleged call. At first he stated it occurred between 3:00 and 4:00 p.m. Later, after a recess, he changed the time to 4.00 to 5:00 p.m. Compare A-106 with A-125.

7. Hamlin was in the back seat of the automobile driven by Woodmansee (DuBray being in the right front passenger seat) when the three men were arrested. The paper bag, containing $3,900.00 in cash was found in the car but there was no evidence that Hamlin exercised any dominion or control over it.

8. After the arrest, Woodmansee made certain statements in the presence of Hamlin, ambiguous in nature, which might be construed as self-incriminatory, but which did not incriminate Hamlin or anyone else. (T-848; 871)

By any objective examination of the non-hearsay evidence, it cannot be seriously maintained that the Government met its burden to prove that Hamlin participated in a conspiracy. That a crime was being committed or that Woodmansee conspired with others, including DuBray, to commit a crime, there is little doubt. Although Hamlin may be faulted for the company he kept, there is simply insufficient independent, non-hearsay evidence to prove his participation by a preponderance of the evidence. It follows, therefore, that Woodmansee's hearsay declarations were admitted against Hamlin in error. The massive prejudice occasioned by the error warrants reversal.

C. THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT HAMLIN WAS GUILTY OF THE CRIMES ALLEGED.

(1) Count I

(a) The Government failed to introduce any convincing evidence that defendant Hamlin traveled from the State of New York to the State of Vermont on the date in question. Moreover, even if it may be inferred from Woodmansee's telephone

call of May 21 that the defendant Hamlin originated in New York on May 21, there is absolutely no evidence that he brought the travelers checks with him.

(b) The Government failed to prove that Hamlin had possession of the travelers checks at any time. There is no evidence, direct or circumstantial that he had either actual possession or that he had the power to exercise dominion or control over them and that he therefore had constructive possession of them.

(c) Since the Government failed to prove actual or constructive possession, they consequently failed to prove that Hamlin knowingly or willingly transported the checks in interstate commerce.

(d) By failure to prove possession, the Government also failed to prove that Hamlin knowingly or willingly transported the checks in interstate commerce. Whereas unexplained possession of property recently stolen in another state may give rise to an inference of knowledge of its stolen character, this inference may not be drawn unless a defendant is proven to be in actual or constructive possession. United States v. Infanti 474 F2d 522 (CA2, 1973). There is no other evidence that tends to show that Hamlin was aware that there were travelers checks, much less that they were stolen.

(e) Hamlin may not be convicted as an aider or abettor under Count I. Assuming arguendo that the checks arrived in DuBray's car, DuBray was acquitted of Count I. By no means did the Government demonstrate that Woodmansee himself trans-

ported the checks. Therefore, there is no one left for Hamlin to have aided. Again, there is no evidence either that Hamlin participated in an illegal venture, or that if he participated, that he did so knowingly or willingly.

(2) Count II

(a) There is no evidence that Hamlin received, concealed, stored, bartered, sold or disposed of the travelers checks.

(b) There is no evidence that Hamlin had either actual or constructive possession of the checks and consequently there is no evidence that he "received" them.

(c) There is no evidence that by his conduct Hamlin acted knowingly or willingly.

(d) Since there was no evidence regarding the interstate movement of the checks, there was no basis for the jury to determine that the checks were still moving in interstate commerce at the time they were received, concealed, stored, bartered or disposed of.

(e) There is no evidence that Hamlin knew the checks were stolen. As stated above, since there is no evidence that Hamlin actually or constructively possessed the checks, possession cannot be used as the basis for the inference of knowledge.

(f) There is no evidence as well that Hamlin aided and abetted with respect to Count II. The evidence shows no more than mere presence. United States v. Johnson 513 F2d 819 (CA2, 1975). If he did participate, there is no evidence that he did so knowingly or willingly.

(3) Count III

As has been set forth at some length, there is insufficient evidence to support the Court's finding that the Government demonstrated Hamlin's participation in the conspiracy by a fair preponderance of the evidence. If this proposition is accepted, and the Court examines the non-hearsay evidence, it is evident that even in the light most favorable to the Government, there is insufficient evidence to warrant the jury's determination beyond a reasonable doubt that Hamlin was guilty of conspiracy.

POINT II

THE COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO PERMIT CROSS-EXAMINATION OF CHURCHILL REGARDING A MISDEMEANOR WHICH OCCURRED SUBSEQUENT TO HIS DECISION TO "COOPERATE" WITH THE GOVERNMENT

The testimony of Churchill was critical to the Government's case. It is not too extreme to state that without Churchill's testimony, there would be no case at all against Hamlin. In criminal proceedings which depend so overwhelmingly on the testimony of one witness, the Court should permit the broadest cross-examination of that individual. United States v. Beaudine 368 F2d 417 (CA5, 1966).

In the words of the Assistant U.S. Attorney, "Mr. Churchill is a person of somewhat unusual circumstance ... We are not trying to paint angel's wings on Mr. Churchill." (T-1297) There is no dispute that Churchill took the witness stand as a four-time convicted felon. (T-112-119) He had been arrested in March, 1976, in the midst of a sale of methamphetamine to a state undercover agent. He was indicted by the federal Grand Jury on five counts involving conspiracy and sale of regulated drugs. (T-121-122) For potential violation of parole by the State of Vermont, he was faced with imprisonment for six to ten years. (T-102) One can only speculate what sort of sentence he would have received from the U.S. District Court had he been convicted without lending his cooperation to the authorities. At the time of his arrest and testimony, Churchill was nineteen years of age.

A. CROSS-EXAMINATION OF CHURCHILL REGARDING HIS MISDEMEANOR CONVICTION SHOULD HAVE BEEN PERMITTED UNDER RULE 608 OF THE FEDERAL RULES OF EVIDENCE

It is self-evident that the Government worked to present Churchill as a witness who was telling the absolute truth - despite his background. Churchill, of course, insisted that his testimony was truthful. Upon cross-examination, Churchill testified that he had decided to cooperate with the authorities because he had "seen a light." (A-153) "I came very, very close to getting shot, and I didn't want to come that close again, and I did not want to ever have anything to do with any more drugs or nothing." (A-153) (emphasis added). Upon further cross-examination, Churchill reluctantly admitted that his desire to avoid imprisonment was also a factor in his decision to cooperate. (A-163-164)

The impression left with the jury by Churchill's testimony to that point was that Churchill had undergone a miraculous conversion. That as a consequence of his brush with death, combined with the looming penalty of a lengthy jail term, he was now a law-abiding citizen, walking the straight and narrow and thereby worthy of the jury's belief. This impression was enhanced by the following exchange:

> Q: I think that the term you used on Friday afternoon was that you had suddenly "seen the light". Was that it?
>
> A: Yes.
>
> Q: Was that the term you used? What did you mean by that?
>
> A: What I mean is that this [sic] was not going to get involved in any more criminal activities.

Q: You weren't going to get involved in any more criminal activities - What was the date of that?

A: I don't know the date.

Q: Sometime in March, wasn't it?

A: Yes.

Q: March 12th?

A: I don't know the date. It was in March, yes.

(A-164-165)

Counsel for defendant Hamlin wished to inquire concerning a misdemeanor conviction (resisting arrest)* which had occurred subsequent to Churchill's "seeing the light." Because this area had been the subject of a previous bench conference (T-215-26) counsel sought the Court's guidance before attempting to re-enter the area. A lengthy colloquy at the bench again ensued. Ultimately, the court refused to permit counsel to inquire. In so doing, the court abused its discretion and committed prejudicial error. See United States v. Corr 543 F2d 1042 (CA2, 1976).

It is not disputed that if counsel had simply wished to impeach Churchill's credibility generally, the Court's ruling would have been correct under Rule 609, Federal Rules of Evidence. However, counsel made it clear that he was seeking responses pursuant to Rule 608(b).

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* Churchill was actually charged with three offenses, but pled guilty to one. (T-219-220)

The first paragraph of Rule 608 is divided into two parts. The first states only that extrinsic evidence may not be employed to prove specific instances of the conduct of a witness other than those provided for in Rule 609. There is no question that counsel was not seeking proof by extrinsic evidence. In fact, he specifically represented to the court that he would be satisfied with the witness's answer. (A-166-167) The question, then, is whether the Court abused the discretion granted in the second part of the first paragraph of 608(b).

Rule 608(b) provides in relevant part that "[Specific instances of the conduct of a witness] may ... in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, ..."

The precise basis of the Court's denial of counsel's request is not in focus. Counsel argued that Churchill's testimony, if not an outright falsehood, was certainly misleading to the jury as to his character for truthfulness. The Court seemed to believe that the witness had answered the questions put to him at that point truthfully - that he had merely testified concerning his state of mind at the time of his conversion - and that further inquiry was unwarranted. In doing so, the Court stated "To be quite frank, I think it is a difficult area to pass on the Rule, but based on testi-

mony, I will sustain the objection ... [T]he rule may be more stringent than I personally would care to apply, but I think I am applying it as the case in text contemplates ...." (A-168)

In the context of Churchill's testimony, the response sought by counsel was indeed probative of truthfulness or untruthfulness. Though the underlying offense was not of the order described by McCormick, (McCormick Evidence §42 at 87 (1954) and echoed by Weinstein, (3 Weinstein's Evidence ¶608[05] at 608-27-28 (1976) in its chronological setting it was nevertheless relevant on the issue of Churchill's credibility. Churchill in effect told the jury: as of the moment of my decision to co-operate, I decided to be a law-abiding citizen. The conviction for an offense committed subsequent to that decision and prior to trial directly reflects on his credibility. Had it occurred prior to Churchill's conversion, it is conceded that it would have been properly excluded.

In United States v. Panebianco, 543 F2d 447 (CA2, 1976) this Court affirmed a trial court's evidence ruling which had permitted the Government to rehabilitate one of its witnesses by introducing evidence of an unrelated death threat. Despite the massive prejudice that usually accompanies such testimony, its admissibility was affirmed because "where cross-examination has been used to elicit an incomplete picture which gives a distorted impression of a witness's credibility, the prosecution should generally be allowed to set the record straight on redirect." 543 F2d at 455.

In the instant case, the shoe is on the other foot. The Government sought to establish Churchill as a credible witness. Another defendant had elicited testimony of intent to lead a law-abiding life. The jury was left with a "distorted impression" and defendant Hamlin should have been permitted "to set the record straight."

Judge Weinstein agrees:

> Rule 608 expressed the Advisory Committee's feeling that since the issue of credibility is often central, depriving the jury of relevant information about witnesses is unwarranted and unduly interferes with the law's basic emphasis on truth-finding. It recognizes, however, that a mechanical test of admission may be incapable of achieving justice in a particular case. Rule 608(b) should accordingly be interpreted in a manner consonant with the basic aims of the rules of evidence: to strike a balance between the needs of the judicial system and the needs of the individual witness as determined by the unique circumstances of the case in which he is appearing.

3 Weinstein's Evidence ¶608[05] at 608-24 (1976).

Rule 403 provides general guidelines for the exclusion of relevant evidence. If the Court in fact considered these guidelines, it does not appear on the record. Had the Court considered these criterion, it would have determined that none mitigated against the proposed testimony and so should have permitted the line of inquiry.

Rule 403 provides that relevant testimony may be excluded if its probative value is substantially out-weighed by:

(1) The value of unfair prejudice. The alleged conviction was for resisting arrest. The crime itself was unlikely to prejudice the jury against the witness in light of the revelation of his commission of several serious felonies. The

importance of the testimony for the defendant was not the seriousness of the underlying offense, but rather the timing. In this respect, it was of the utmost importance.

(2) Confusion of the issues. There was no danger of confusing the issues in the minds of the jury.

(3) Misleading the jury. Far from misleading the jury, the defendant was seeking to correct a misimpression caused by direct and cross-examination of other parties.

(4) Waste of time. Counsel needed only two or three questions to make his point. If cross-examination in the area proved to be too lengthy, the Court could have terminated the questioning. This factor was raised by no one. In view of the length of the trial, it cannot be suggested seriously that a few more questions would have wasted time.

(5) Needless presentation of cummulative evidence. There is no suggestion that the evidence was cummulative. To the contrary, it had never even been suggested to the jury previously.

The failure to permit cross-examination of this type might otherwise be considered harmless error, but defendant Hamlin submits that his conviction or acquittal hinged on Churchill's testimony alone. It is for this reason that the Court's failure to permit this line of cross-examination warrants reversal. Compare United States v. Kirk 496 F2d 947 (CA8, 1974) where evidence was deemed sufficient to support the conviction leaving aside the testimony of the witness whose impeachment

was sought. See United States v. Beaudine 368 F2d 417 (CA5, 1966).

In Panebianco, supra, the Court stated that the possibility of prejudice to the defendant caused by introduction of the death-threat testimony was lessened because the Government's case was particularly strong. 453 F2d at 455. In the instant proceeding, the Government's case against Hamlin rested largely on the testimony of Churchill, which depended, of course, on his credibility. Thus, the prejudice caused to defendant Hamlin was particularly strong.

The jury should have been afforded the opportunity to consider Churchill's testimony in the light of his wrong-doing after he had "seen a light." The failure of the Court to permit the inquiry constituted reversible error.

B. CROSS-EXAMINATION OF CHURCHILL REGARDING HIS MISDEMEANOR CONVICTION SHOULD HAVE BEEN PERMITTED ON THE ISSUE OF BIAS

Cross-examination of Churchill on the misdemeanor conviction should also have been permitted under Rule 607 on the question of his bias. The issue of bias was raised by counsel for defendant Woodmansee. (A-168-169) Representations were made to the Court by Hamlin's counsel - concurred in by the assistant U.S. Attorney - that Churchill had actually been arrested and charged with three offenses, had pleaded guilty to only one, and had been placed on probation. (T-219-220) Given the context in which these events occurred there was substantial possibility that the disposition was additional

consideration extended to Churchill in return for his cooperation. Yet no cross-examination was permitted. The Court's refusal to permit cross-examination constituted reversible error. United States v. Miles 480 F2d 1215 (CA2, 1973). Again, the Court did not appear to be aware that it had discretion, but even if it did, under the standards set forth in Rule 403, its failure to allow the same constituted a clear abuse of discretion.

POINT III

THE COURT COMMITTED PREJUDICIAL ERROR IN FAILING TO CHARGE THE JURY AS REQUESTED

A. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT CHURCHILL'S TESTIMONY BEFORE THE GRAND JURY COULD BE CONSIDERED BY THE JURY FOR THE TRUTH OF THE MATTER ASSERTED INSTEAD OF FOR MERE IMPEACHMENT PURPOSES.

In his charge to the jury, the Court instructed as follows as to prior inconsistent statements:

> If you find that any of the witnesses in this action who are not parties made statements outside of Court inconsistent with their testimony in Court, as to the facts involved in this case, you may consider these inconsistent statements only for the purpose of impeachment of the witness, or evaluating his or her credibility and not for the purpose of showing the same to be true. (A-212)

At the conclusion of the Court's charge, Duncan Kilmartin, counsel for defendant Woodmansee made the following objection:

> MR. KILMARTIN: We object to that portion dealing with impeachment and by inconsistent statements in that it fails to follow the provisions of Rule 801 of the Rules of Evidence, particularly in reference to Churchill's grand jury testimony. (A-234)

Under the Court's general trial order, an objection by any defendant was deemed an objection by all. (A-58-59) The Court's response to counsel's objection is ambiguous. What is not ambiguous is that he did not honor the objection.

In failing to instruct the jury in accordance with Rule 801(d)(1) the Court not only failed to adhere to the rule, he also failed to conform to the rule established by this Court as far back as United States v. DeSisto, 329 F2d 929 (CA2, 1964), cert. den. 377 U.S.979 (1964).

At issue was the consideration to be afforded to certain grand jury testimony of Michael Churchill which was thoroughly explored both by the Government and defendant Hamlin's counsel in the course of the trial.

Upon direct examination, Churchill testified about an alleged statement made by Hamlin at the Stockyard Inn after his (Churchill's) exchange of cash for travelers checks with Woodmansee. (A-123) On cross-examination, counsel brought out the fact that when Churchill appeared before the Grand Jury, he had not testified as to any such conversation. (A-150-151) The Government attempted to rehabilitate the witness on redirect (A-157-158), but on re-cross-examination counsel made it clear that at the Grand Jury Churchill had been asked an open-ended question. He was asked immediately after he described the exchange with Woodmansee, "And then you left?" And his response was "Then I left." He persisted that he could not have related anything about the conversation unless he was specifically asked,but finally admitted that he could have said "No, there was a conversation." in response to the question. (A-172-173)

In United States v. DeSisto 329 F2d 929 (CA2, 1964) this Court held that a prior inconsistent statement of a witness, given under oath, could be considered by the jury as substantive evidence and not merely for the purposes of impeachment. This proposition has been upheld on many occasions since that time. United States v. Nuccio 373 F2d 168 (CA2, 1967) cert. den. 392 US 930 (1968), United States v. Mingoia 424 F2d 710 (CA2, 1970) The Court has also held that incon-

sistent testimony before a grand jury may be introduced as substantive evidence. United States v. Insana 423 F2d 1165 (CA2, 1970), cert. den. 400 US 841 (1970), United States v. Rivera 513 F2d 519 (1975), cert. den. 423 US 948 (1975), United States v. Jordano 521 F2d 695 (1975).

Rule 801 (d)(1)(A) of the Federal Rules of Evidence for the most part incorporates the rule developed in DeSisto.

> 801(d) Statements which are not hearsay. A statement is not hearsay if -
>
> (1) Prior statement by witness. The declarant at a trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, ...

Some question is raised because 801(d)(1)(A) omits any reference to a grand jury proceeding. However, Judge Weinstein believes that the rule was not intended to be substantially different than Rule 804(b)(1), which does contemplate grand jury testimony. 4 Weinstein's Evidence ¶801(d)(1)[01] at 801-70. Weinstein further states that the phrase "trial, hearing, other proceeding or disposition" should be broadly interpreted to include judicial or quasi-judicial proceedings such as grand jury testimony. Id. at 801-77.

Certainly in the instant proceeding, Churchill's grand jury testimony should have been considered as substantive evidence. The operative requisites of the rule are that the prior statement be under oath and subject to cross-examination. Churchill, of course, was under oath before the grand jury.

Logically, the requirement that the declarant be subject to cross-examination would appear to be for the protection of the opponent of the prior inconsistent statement. In other words, the reliability of the prior statement may be said to depend on the opportunity of the opponent to cross-examine the declarant. Compare Rule 804(b)(1). In this case, it was the opponent of the prior inconsistent statement, the Assistant U.S. Attorney, who developed Churchill's testimony before the grand jury.

The failure of the Court to instruct the jury properly deprived defendant Hamlin of the opportunity to have the jury consider critical substantive evidence that was in his favor. Hamlin has been severely prejudiced because Churchill's inconsistent trial testimony regarding the conversation was the only evidence against Hamlin that approaches direct evidence. If the jury had been able to consider Churchill's grand jury testimony as substantive evidence, they may well have acquitted Hamlin.

It has been commonly held that submission of non-testimonial prior inconsistent statements as substantive evidence may constitute reversible error. United States v. Cunningham 446 F2d 194 (CA2, 1971), cert. den. 402 US 950 (1971), United States v. Tavares 512 F2d 872 (CA9, 1975), See United States v. Briggs 457 F2d 908 (CA2, 1972), cert. den. 409 US 986 (1972).

The reason, presumably, is that it is extremely prejudicial to place as substantive evidence before the jury testimony that

has not been subjected to cross-examination of the opponent of the proffered evidence. The converse is equally prejudicial. In this instance, the failure of the Court to permit the jury to consider Churchill's prior testimony as substantive evidence deprived Hamlin of crucial evidence which was in his favor.

In the Tavares decision, supra, the Ninth Circuit, in reversing the defendant's conviction, emphasized it was doing so particularly because the non-testimonial prior inconsistent statement was the only direct evidence that the Government introduced against the defendant. In the present proceeding as well, the only near-direct evidence that the Government introduced against Hamlin was the alleged conversation with Churchill. The non-hearsay circumstantial evidence against him was unconvincing. Had the conversation been "removed" from the evidence, the jury may well not have convicted Hamlin. For this reason alone, his conviction should be reversed.

B. THE COURT ERRED IN FAILING TO CHARGE THE JURY THAT A PERSON'S MERE PRESENCE IS INSUFFICIENT TO ESTABLISH ACTUAL OR CONSTRUCTIVE POSSESSION OF PROPERTY.

As has been discussed in Point I, defendant Hamlin contends that there was absolutely no evidence to demonstrate that he ever had possession of the travelers checks, whether actual or constructive. No offer was made that he had actual possession. There is insufficient evidence to give rise to an inference of constructive possession.

Possession by itself is not only a vital element of both Counts I and II; possession may give rise to an inference of knowledge. Therefore the determination by the jury of possession of the travelers checks beyond a reasonable doubt is of critical importance.

In his requests to charge, defendant Hamlin requested the Court to instruct the jury that a defendant's mere presence in a room or automobile is insufficient to establish actual or constructive possession of particular property. (R Document 124, p.8) Although the Court indicated that he would include this instruction (A-221), he did not do so. After the Court completed his instructions, counsel for Hamlin specifically asked that this instruction be given, but the request was refused. (A-236)

Hamlin maintains that there was insufficient evidence to prove either actual or constructive possession. At best, the evidence was marginal. Under the circumstances, it is not unlikely that the jury considered his mere presence as some evidence of constructive possession.

This Court has ruled clearly that mere presence is insufficient to establish actual or constructive possession. United States v. Infanti, supra. Had the jury been properly instructed on this point, they may well have determined that there was no possession, and no knowledge as well. Examining the evidence as a whole, this would have been a reasonable determination.

IV ADOPTION BY REFERENCE

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, defendant Hamlin hereby adopts by reference those arguments and portions of the briefs of defendants Woodmansee and DuBray as may be applicable to his own appeal.

A. THE COURT FAILED TO PROTECT THE DEFENDANTS FROM PREJUDICE EXISTING IN THE COMMUNITY AGAINST DEFENDANT WOODMANSEE

In particular, defendant Hamlin adopts the argument of defendant Woodmansee that the Court committed prejudicial error in failing to grant a change of venue and in failing to conduct voir dire of the veniremen in a manner calculated to expose prejudice and bias against defendant Woodmansee individually and the defendants collectively.

Defendant Hamlin concurs with defendant Woodmansee that the latter was notorious in the community and had received adverse publicity both in connection with the instant case and in relation to past offenses. Any errors committed by the Court in refusing to change venue or in failing to conduct voir dire appropriately which resulted in prejudice to Woodmansee, must perforce result in prejudice to Hamlin as well. It would be impossible to believe that any prejudice which the jury harbored against Woodmansee would not be transferred to those who were associated with him as well.

Additionally, because of the prejudice existing against Woodmansee, the Court abused its discretion in refusing to grant defendant Hamlin a severance from Woodmansee for the purpose of trial.

CONCLUSION

The judgment of conviction should be reversed and the cause remanded to the District Court for the entry of a judgment of acquittal.

Respectfully submitted

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May 9, 1977

ADDENDUM

Rule 608

EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

***

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attaching or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule 801

DEFINITIONS

The following definitions apply under this article:

***

(d) Statements which are not hearsay. A statement is not hearsay if -

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee	)	
v.	)	Docket No. 77-1022
BERNARD WOODMANSEE, SR., JACKY E. DUBRAY and ROY M. HAMLIN, Appellants.	)	

CERTIFICATE OF SERVICE

I, Michael S. Kupersmith, do hereby certify that I have served two copies of the Brief of Appellant Roy M. Hamlin upon each of the following persons at his respective office address, by mailing the same to them via first class mail this 9th day of May, 1977.

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